(S E R V E D)
(JANUARY 6, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-12

DISTRIBUTION SERVICES, LTD. v. TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN AND ITS MEMBER LINES

Conference publication and implementation of a transloading allowance rule requiring that the transloading take place at facilities which are not a shipper's, consignee's, forwarder's (I.C.C. Part IV licensed forwarder), NVOCC's or ocean carrier's place of business found to be an unreasonable practice in violation of section 10(d)(1) of the Shipping Act of 1984. No unfair or unjust discrimination, undue or unreasonable preference or advantage or prejudice or disadvantage has been shown. Nor has it been shown that the rule results in a boycott or unreasonable refusal to deal, or is a predatory practice or restricts intermodalism.

Conference may properly deny a claim for transloading allowances on the grounds that the claimant failed to document the claim as required by the conference transloading allowance rule.

Record fails to establish that complainant NVOCC suffered any actual damages as a result of the Conference's denial of transloading allowances.

Edward M. Cohan and Steven H. Blum for complainant Distribution Services, Ltd.
Charles F. Warren, George A. Quadrino and Benjamin K. Trogdon for respondents Trans-Pacific Freight Conference of Japan and its member lines.
Stanley O. Sher and Michael G. Roberts for respondents Hapag-Lloyd A.G. and Lykes Brothers Steamship Co., Inc.

REPORT AND ORDER

BY THE COMMISSION: (Edward V. Hickey, Jr., Chairman; James J. Carey, Vice Chairman; Francis J. Ivancie, Thomas F. Moakley, and Edward J. Philbin, Commissioners.*

*/ The concurring and dissenting opinions of Commissioners Moakley and Ivancie are attached.

This proceeding was initiated by a complaint filed by Distribution Services, Ltd. ("Complainant" or "DSL") against the Trans-Pacific Freight Conference of Japan ("Respondent", "TPFCJ" or "Conference")[1] and its member lines.[2] The complaint alleges that TPFCJ's denial of a "transloading" allowance discriminated against DSL and others, is a predatory practice designed to eliminate competition, exceeds the authority contained in TPFCJ's tariff, is contrary to the Conference agreement and stifles intermodalism, in violation of sections 10(a)(3), 10(b)(1), 10(b)(3), 10(b)(6)(D), 10(b)(10), 10(b)(11), 10(b)(12), 10(c)(1), 10(c)(2), 10(c)(3) and 10(d)(1) of the Shipping Act of 1984 ("1984 Act"). 46 U.S.C. app. §§ 1709(a)(3), 1709(b)(3), 1709(b)(1), 1709(b)(3), 1709(b)(6)(D), 1709(b)(10), 1709(b)(11), 1709(b)(12), 1709(c)(1), 1709(c)(2), 1709(c)(3), 1709(d)(1). DSL asks for a cease and desist order and seeks reparations in the amount of $44,750, with interest, and an additional amount not to

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[1] Prior to August 30, 1985, the Conference was the Trans-Pacific Freight Conference of Japan/Korea. Although the shipments which are the subject of this proceeding took place prior to that date, the change in the Conference has no bearing on the issues in this case.

[2] Three of the individual carrier respondents named in the complaint are no longer members of the Conference. One of the three, Korea Marine Transport Company, Ltd., has entered into a settlement agreement with DSL. The other two, Lykes Bros. Steamship Co., Inc. ("Lykes") and Hapag-Lloyd A.G. ("Hapag"), filed motions to dismiss which were denied.

exceed twice the amount of the actual injury and attorney's fees.

The proceeding was assigned to Administrative Law Judge Joseph N. Ingolia ("Presiding Officer") for hearings and an Initial Decision ("I.D.") The record developed during the hearing consists of five volumes of transcripts and fifty exhibits.[3] After receiving briefs from all parties the Presiding Officer issued an I.D. in which he concluded that the Conference had violated sections 10(b)(1), (3), (6)(D), (10), (11), (12) and section 10(d)(1) of the 1984 Act. However, he found that the record was insufficient to permit him to calculate the amount of reparations. The proceeding is now before the Commission on Exceptions to the I.D.

BACKGROUND

The tariff rule which is at the center of the controversy was developed in order to address a situation faced by steamship lines publishing "Overland Common Point" ("OCP") rates applicable to cargo moving from the Far East via Pacific Coast ports to points within the OCP territory - roughly that

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[3] The decision in this proceeding has been reached without reference to the affidavit of Ms. Cherrie Barnes Gogue. Although DSL served the Conference with a copy of the affidavit prior to the hearing in this proceeding, the affidavit of Ms. Gogue was never offered and received in evidence during the hearing. It is not part of the evidentiary record in this proceeding.

part of the United States east of the Rocky Mountains.[4] Historically more cargo moves from the Far East to the OCP territory than moves in the opposite direction. Thus, steamship lines often must return empty marine containers from points in the OCP territory to ports on the West Coast at their own expense. The cost of returning an empty container may be avoided if the OCP cargo, upon reaching a Pacific Coast port, is unloaded from the marine container and placed in an inland carrier's container for transportation to the OCP territory. In order to encourage this practice, the Conference tariff authorizes member lines to pay a consignee an allowance designed to cover the consignee's expense of transferring or "transloading" cargo into the inland carrier's container.

The "transloading" allowance rule which is the subject of this case is Rule 2(J) ("Rule") of TPFCJ Tariff No. 36, FMC-7. During the period relevant to this proceeding (March 1983 - August 1985), the text of the Rule read as follows:

> (J) Transloading of OCP Cargo (Expiring December 31, 1983)[5]
>
> At West Coast ports the ocean carriers may absorb the costs of transloading cargo booked for through-put service from marine containers to rail

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[4] "Overland Common Point" or "OCP" rates are port-to-port rates for transportation from the Far East to U.S. Pacific Coast ports. They are set at a level to make the aggregate freight charges for ocean transportation plus inland transportation from Pacific Coast ports to the OCP territory competitive with the aggregate charge utilizing other gateway ports.

[5] The expiry date was extended to June 30, 1984 by 27th Revised Page 20, December 31, 1984 by 28th Revised Page 20 and June 30, 1985 by 29th Revised Page 20. The expiry date was deleted by 30th Revised Page 20.

trailers, such absorption not to exceed $75[6] per 20-foot containerload[7] or $150[8] per 40-foot containerload,[9] but no absorption will be permitted by the Members of drayage between the ocean carriers' CY and the transloading facility, provided:

(1) That the cargo moves in direct interchange to an inland carrier for delivery to an OCP,[10]
(2) That the cargo is released to a single consignee from one vessel at the interchange port,
(3) That the cargo moves on a CY/CY basis or CFS/CY basis,
(4) That the transloading facilities are located between carrier's CY and the railroad ramp facilities serving the port but such facilities may not be a shipper's, consignee's, forwarder's (ICC part IV licensed forwarders), or NVOCC's place of

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6 The allowance was increased to $85 per 20-foot container effective August 1, 1983 by 26th Revised Page 20. This was increased to $125 effective February 1, 1985 by 30th Revised Page 20.

7 An allowance of $131 per 35-foot container was added effective June 25, 1983 by 25th Revised Page 20. This was raised to $153 effective August 1, 1983 by 26th Revised Page 20. It was raised again to $220 effective February 1, 1985 by 30th Revised Page 20.

8 The allowance was increased to $175 per 40-foot container effective August 1, 1983 by 26th Revised Page 20. This was increased to $250 effective February 1, 1985 by 30th Revised Page 20.

9 An allowance of $300 per 45-foot container was added effective February 1, 1985 by 30th Revised Page 20.

10 Effective March 1, 1985 this language was amended to read:

(1) That the cargo moves in direct interchange to an inland carrier only, and only in full containerloads, for delivery to an OCP, payment of the above allowance for transloading partial containerloads not being permitted.

31st Revised Page 20.

business,[11]

(5) That the consignee submits a proof certifying direct interchange,

(6) That the containerized cargo moving on an exclusive use basis as defined in rule 109 shall remain intact throughout the entire transit to the destination and not subject to the above transloading provisions,

(7) That the beneficial owner of the cargo has submitted to the ocean carrier written permission for such transloading to take place,

(8) That claims for the absorption of transloading costs by the ocean carrier as provided above must be submitted to the ocean carrier within sixty (60) calendar days commencing with the day on which the carrying vessel completes discharge of the cargo involved, and

(9) That in support of the claim in (8) above the consignee or its agent must submit, together with the claims, the proof in (5) above plus the following:

- (a) The rail[12] carrier's bill of lading or waybill,
- (b) The date of the transloading,
- (c) The marine container number and rail trailer[13] number,
- (d) The name of the importing vessel and its voyage number,
- (e) The ocean carrier's bill of lading number,
- (f) The final inland OCP, and

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[11] Effective August 1, 1983 this language was amended to read:

> (4) That the transloading be arranged by and for the account of the consignee and not take place at any ocean carrier facility or at any shipper's, consignee's, forwarder's (ICC Part IV licensed forwarders), or NVOCC's place of business,

26th Revised Page 20.

[12] The words "or motor carrier's" were added after the word "rail" by 27th Revised Page 20, effective January 1, 1984.

[13] The words "or motor equipment" were added after the word "trailer" by 27th Revised Page 20, effective January 1, 1984.

(g) The copy of invoice for actual cost to transloading each container.

24th Revised Page 20. Exhibit N, Attachment D.

DSL, a non-vessel operating common carrier ("NVOCC"), claimed transloading allowances in connection with 99 shipments which were moved during the period from March 1983 through August 1985. Neptune Orient Lines, Ltd. ("NOL"), a Conference member, denied DSL's claim for the allowances on the grounds that DSL failed to comply with Subpart (4) of the Rule because the 99 shipments were transloaded at a facility operated by DSL Transportation, Inc. ("DSLT"), an affiliate of DSL. The denial of the allowance provoked DSL to file the complaint instituting this proceeding.

DISCUSSION AND CONCLUSIONS

A. Unjust discrimination, undue or unreasonable preference or prejudice or advantage or disadvantage.

The Presiding Officer found that Subpart (4) of Rule 2(J), which prohibits the payment of a transloading allowance where the transloading takes place at the facilities of a shipper, consignee, Interstate Commerce Commission ("ICC") regulated Part IV freight forwarder, NVOCC and, since August 1, 1983, ocean carrier, is contrary to the stated purpose of Rule 2(J) which is to encourage transloading. He rejected the Conference's explanation that the restriction was necessary to preclude collusion and possible rebates stating: "There is no more reason to believe on this record that 'in-house' transloading would generate rebating any more than would any other transloading." I.D. at 28. He did not accept Conference testimony to the effect that the restriction is non-discriminatory because it "places NVOCC's on precisely the same footing as shippers, consignees, freight forwarders, and direct ocean common carriers, including Conference members." I.D. at 28. In the view of the Presiding Officer, the discrimination arises between those that perform transloading at their own facilities and those that do not. As a result, he concluded that Subpart (4) of Rule 2(J) is unjustly discriminatory in violation of sections 10(b)(6)(D) and 10(b)(10), results in an undue or unreasonable preference or advantage in violation of section 10(b)(11), and creates an undue or unreasonable prejudice or disadvantage in violation of section 10(b)(12) of the 1984 Act.

On Exceptions, TPFCJ argues that the Presiding Officer's conclusion that Subpart (4) of Rule 2(J) is unlawful under the 1984 Act sections mentioned above is contrary to the weight of the evidence. The Conference Chairman testified that the members of TPFCJ were concerned that they would be unable to verify the cost of transloading. He further testified as follows:

> If a consignee contracts with another company to perform the transloading, it would have a bill from the transloader that would support a claim for the allowance. If, on the other hand, the consignee performs the transloading itself, there would be no bill that could be used to verify the cost of transloading. In the absence of any independent means to verify expenses, there would be a strong incentive

> for the consignee to simply claim the maximum allowance. Ex. N, at 11-12.

Additionally, the Conference Chairman testified that the members of TPFCJ were concerned that NVOCCs would tend to route cargo to those carriers granting them the greatest transloading allowance. Ex. N at 13. TPFCJ argues that the Presiding Officer erred by rejecting the testimony of the Conference Chairman with regard to the problem of verifying transloading expenses and misconstrued the testimony regarding the NVOCC's ability to route cargo based on the allowances received. The Conference maintains that the Conference Chairman's testimony focused on competition between TPFCJ members for cargo controlled by NVOCCs and not on taking business from NVOCCs.

The Conference argues that the I.D. is not only contrary to the evidence, but also at variance with the law. TPFCJ points out that the Commission in General Investigation of Pickup and Delivery Rates and Practices in Puerto Rico, 16 F.M.C. 344 (1973) ("Pickup and Delivery in Puerto Rico"), took remedial action against a tariff rule providing for absorptions for pickup and delivery when there was a potential for rebating. The Conference maintains that it is obliged to avoid tariff provisions that create such a potential. It is noted that one means of avoidance recognized by the Commission is to base the allowance or benefit on documentation prepared by third parties that presumably have nothing to gain by falsifying the documents. Stockton Port District v. Pacific Westbound Conference, 9

F.M.C. 12 (1965) ("Stockton"). TPFCJ argues that the decision of the Presiding Officer disregards both Stockton and Pickup and Delivery in Puerto Rico.

In its Exceptions, DSL argues that there is no legitimate reason why the allowance must, or even should, be based on the actual cost of transloading. The real cost with which the Conference should concern itself, DSL maintains, is the lowest allowance it can pay to maintain an adequate number of ocean containers on the West Coast.

In addressing whether Subpart (4) is unjustly discriminatory or results in an undue preference or prejudice it is appropriate to review the elements necessary to establish such violations. The prohibition against an unreasonable preference or advantage or an undue or unreasonable prejudice or disadvantage contained in sections 10(b)(11) and 10(b)(12) of the 1984 Act[14] originally appeared in section 16 First of the Shipping Act, 1916, ("1916 Act"). Section 16 First was substantially identical to former section 3(1) of the Interstate Commerce Act ("ICA"). Cases involving section 3(1) of the ICA leave no

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14 (b) COMMON CARRIERS.--No common carrier, either alone or in conjunction with any other person, directly or indirectly, may--

(11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;

(12) subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever;

doubt that the prohibition against undue or unreasonable prejudice or disadvantage was intended to deal with a situation in which two or more competitors, shipping on the same carrier over different routes to the same destination, receive different treatment which is not justified by differences in competitive or transportation conditions. Liberty Cooperate & Lumber Co. v. Michigan Central R.R. Co., 109 I.C.C. 1 (1926) and Texas & Pac. Railway v. ICC, 162 U.S. 197 (1896). The ICC has construed section 3(1) as requiring the presence of a competitive relationship to prove a case of undue preference or prejudice.

The Commission has generally adopted the ICC's construction. North Atlantic Mediterranean Freight Conference - Rates on Household Goods, 11 F.M.C. 202, 209-210 (1967) ("Household Goods"), modified on other grounds sub. nom. American Export Isbrandtsen Lines, Inc. v. FMC, 409 F.2d 1258 (D.C. Cir. 1969)). Thus, it has been held that in order to establish a violation of section 16 First of the 1916 Act, it must be shown that: (1) two shippers are given unequal treatment; (2) the shippers are competitors;[15] (3) the prejudice or disadvantage is the proximate cause of injury; and (4) the unequal treatment is not justified by differences in transportation circumstances.

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[15] However, the Commission requires no showing of a competitive relationship between shippers if the tariff rule or charge is applied without regard to the commodity shipped. Investigation of Free Time Practices - Port of San Diego, 9 F.M.C. 525 (1966) ("San Diego"). See also Valley Evaporating Co. v. Grace, Inc., 14 F.M.C. 16 (1970).

The prohibition against unjust discrimination contained in sections 10(b)(6) and 10(b)(10)[16] was originally contained in sections 14 Fourth and 17 of the 1916 Act. These sections were traditionally applied where it could be shown that two or more shippers, making shipments by the same carrier under substantially similar transportation circumstances and conditions, were treated differently by that carrier. Because the shipments must move under substantially similar transportation circumstances (e.g., same route, same commodity), it has been held that it is immaterial whether the shippers are actually in competition or whether the ability to compete has been impaired. Household Goods at 213.

In cases of unjust discrimination and undue preference or prejudice, the shipper that is preferred and the shipper that is disadvantaged or discriminated against must both be customers of the carrier or terminal operator. Terminal Charges at Norfolk, 1 U.S.S.B.B. 357, 358 (1935); Wharfage Charges and Practices at Boston, 2 U.S.M.C. 245 (1940), and

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[16] Section 10(b) provides, in relevant part:

> (b) COMMON CARRIERS.--No common carrier, either alone or in conjunction with any other person, directly or indirectly, may--
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> * * *
>
> (6) except for service contracts, engage in any unfair or unjustly discriminatory practice in the matter of--
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> (D) the loading and landing of freight; or
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> * * *
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> (10) demand, charge, or collect any rate or charge that is unjustly discriminatory between shippers or ports;

Boston Shipping Association v. Port of Boston Marine Terminal, 11 F.M.C. 1, 7 (1967).

Rule 2(J) authorizes the payment of a transloading allowance to any consignee meeting the conditions of the Rule. One of those conditions is that the cargo may not be transloaded at the facilities of a shipper, consignee, ICC-regulated freight forwarder, NVOCC or ocean carrier. This requirement does not exclude any class of consignee from receiving a transloading allowance. It simply means that no consignee may use its own facilities for transloading or the facilities of any of the entities named in Subpart (4). The requirement applies to all that apply for a transloading allowance; there are no exceptions. In this sense, at least, the requirement is not discriminatory or prejudicial.

Nonetheless, DSL believes that the requirement is discriminatory and prejudicial because it prevents DSL from providing transloading at its own facilities. Unlike others claiming a transloading allowance, DSL has the facilities to provide transloading and, indeed, transfers incoming cargo into inland containers in connection with its business as an NVOCC. The requirement of Subpart (4) allegedly restricts DSL's ability to provide in-house transloading services to its customers. Thus, the alleged discrimination is said to occur not because Subpart (4) imposes a restriction on one class of consignee and not on another, but because the restriction imposes a particular burden on DSL due to the nature of DSL's business. See Practices, Etc. of San

Francisco Bay Area Terminals, 2 U.S.M.C. 588 (1941). But see Investigation of Minimum Charges and Terminal Delivery Services - Atlantic-Gulf/Puerto Rico Trades, 11 F.M.C. 222 (1967); Absorption of Insurance Premiums, 3 U.S.M.C. 201 (1950).

DSL's case focuses on alleged discrimination, preference and prejudice between those entities named in Subpart (4), which it calls the "Discriminated Four", and inland carriers performing transloading that are not named in the Rule. The difficulty with DSL's argument is that the inland carriers performing transloading that are not named in the Rule are not customers of TPFCJ. Any disadvantage or discrimination which DSL may suffer vis-a-vis other transloaders that are not customers of the Conference is not cognizable under sections 10(b)(6)(D), 10(b)(10), 10(b)(11) or 10(b)(12) of the 1984 Act. See Terminal Charges at Norfolk, 1 U.S.S.B.B. at 358.

Our inquiry must necessarily be limited to discrimination, preference or prejudice among TPFCJ's customers, all of which are named in Subpart (4) of the Rule. Obviously, DSL seeks to make a profit from transloading cargo while other entities named in Subpart (4) which are not in the business of transloading may be content to simply recover their expenses. However, the fact that the restriction may prevent DSL from transloading at a profit does not establish that it unlawfully discriminates against DSL or results in an undue or unreasonable prejudice vis-a-vis the Conference's other customers.

B. Unreasonable regulation or practice.

The Presiding Officer found that Subpart (4) of Rule 2(J) is an unjust or unreasonable regulation or practice relating to or connected with the receiving, handling, storing or delivering of property in violation of section 10(d)(1) of the 1984 Act.[17] The elements of proof necessary to such a finding differ from those discussed above in connection with unjust discrimination and undue or unreasonable prejudice.

Section 10(d)(1) of the 1984 Act derives from the second paragraph of section 17 of the 1916 Act. In Port of San Diego, 9 F.M.C. at 547, the Commission stated with respect to section 17 that:

> Section 17 requires that the practices of terminals be just and reasonable. "Reasonable" may mean or imply "just, proper," "ordinary or usual," "not immoderate or excessive," "equitable," or "fit and appropriate to the end in view." Black's Law Dictionary, Fourth Edition. It is by application to the particular situation or subject matter that words such as "reasonable" take on concrete and specific meaning. As used in section 17 and as applied to terminal practices, we think that "just and reasonable practice" most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view.
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> The justness or reasonableness of a practice is not necessarily dependent upon the existence of

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[17] Section 10(d)(1) provides:

(d) COMMON CARRIERS, OCEAN FREIGHT FORWARDERS, AND MARINE TERMINAL OPERATORS.--

(1) No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering of property.

> actual preference, prejudice or discrimination. It may cause none of these but still be unreasonable. To conclude otherwise is to make the second portion of section 17 merely redundant of other sections of the Shipping Act, a result not readily ascribed to Congress.

TPFCJ seeks to justify Subpart (4) on the grounds that it is necessary to prevent shippers from filing false claims for transloading. By requiring a third party to actually perform the transloading and bill the consignee claiming the allowance, TPFCJ is provided a reliable means of verifying the consignee's costs. The underlying premise is that because the person transloading the cargo is different than the person claiming the allowance there is less incentive to overstate expenses.

While the prevention of rebates and false billing for transloading expenses is undeniably a worthy objective, the issue raised under section 10(d)(1) of the 1984 Act is whether the restrictions contained in Subpart (4) of Rule 2(J) are an appropriate means to achieve that objective. In order to pass muster under section 10(d)(1), a regulation or practice must be tailored to meet its intended purpose. A regulation or practice may have a valid purpose and yet be unreasonable because it goes beyond what is necessary to achieve that purpose. As we stated in San Diego, it must be "fit and appropriate to the end in view". Subpart (9) of Rule 2(J) requires those claiming an allowance to support their claim with certain information and documents. On this record we are unable to find that the documentation requirements of Subpart (9) are not sufficient, standing alone, to prevent rebating or collusion.[18] Absent such a finding, we believe that the requirement that a neutral third party perform transloading is excessive and thus unreasonable. This is not to say that requiring a neutral third party to perform transloading may never be appropriate. If less intrusive methods fail to prevent rebating or collusion such a requirement may be necessary. We find only that the record in this proceeding fails to show that the more intrusive provisions of Subpart (4) are required.[19] We therefore concur in the Presiding Officer's finding of a section (d)(1) violation.

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18 TPFCJ expresses concern that consignees such as DSL performing their own transloading will simply falsify the documents required by Subpart (9) of the Rule. However, it must be borne in mind that falsification of documents in order to obtain a greater allowance is a violation of section 10(a)(1). If the conference receives documents from a consignee which it has reason to believe are false, it has a remedy under the 1984 Act.

19 DSL sees no reason why a transloading allowance must be based on the shipper's actual cost of transloading, adding that it could be nothing more than a fixed amount set high enough to keep containers on the West Coast. While we cannot disagree with DSL, this is not to say that the Conference is under any obligation to establish such a fixed transloading allowance. The record does not support a finding that a cost-based transloading allowance is, in and of itself, violative of the 1984 Act. Accordingly, there would appear to be no basis upon which the Commission could require TPFCJ to make the transloading allowance a fixed amount. In any event, it is not our intention here to formulate the ideal transloading allowance rule. Within the parameters established by the 1984 Act, the Conference remains free to write its own transloading allowance rule.

C. Boycott, unreasonable refusal to deal, predatory practice, activity contrary to conference agreement.

The Presiding Officer determined that the restriction in Subpart (4) was nothing more than a device to take business away from NVOCCs such as DSL:

> Rather, we think it was based on Conference members having "equal access" to cargo, which on this record is another way of saying, "We wanted the business" -- a competitive consideration that ought not to be furthered in a discriminatory tariff.

I.D. at 29. In this regard he found it similar in purpose to the "50 Mile Rule" which was the subject of 50 Mile Container Rules - Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports, 81-11 (FMC, Initial Decision served February 13, 1985). However, the Presiding Officer did not find that the conduct of the Conference amounted to a group boycott within the meaning of sections 10(c)(1) or 10(c)(3) of the 1984 Act.[20]

TPFCJ argues that Rule 2(J)(4) cannot be analogized to the 50 Mile Rule. It contends that while Rule 2(J)(4) is

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[20] Section 10(c) of the 1984 Act provides, in relevant part:

> (c) CONCERTED ACTION.--No conference or group of two or more common carriers may--
> (1) boycott or take any other concerted action resulting in an unreasonable refusal to deal;
> * * *
> (3) engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier;

based on valid transportation circumstances recognized by the 1984 Act, the 50 Mile Rule has its justification in labor considerations which may be antithetical to the principles of the 1984 Act.

DSL argues that Rule 2(J) is a classic example of a boycott or refusal to deal. That the Rule is the product of concerted action is said to be evidenced by the fact that each member of the Conference voted for the Rule and agreed to enforce it. The second element of a group boycott - intent to exclude a competitor - is also alleged to be present. DSL cites the portion of the I.D. quoted above for this proposition. In conclusion, DSL states:

> The Administrative Law Judge correctly found that all facts necessary for an unreasonable boycott or refusal to deal were shown on this record: concerted action by the Conference and its members with the anti-competitive intent of excluding NVOCCs (including DSL) and others from transloading allowances, with no legitimate justification for the rule.

DSL Exceptions at 14.

Any transloading business which DSL and other NVOCCs may lose does not necessarily flow to members of the Conference. Subpart (4) also prohibits the payment of a transloading allowance if the cargo is transloaded at the facilities of an ocean carrier. Thus, the Conference members cannot be said to be in competition with NVOCCs for the transloading business. Accordingly, it has not been shown that Subpart (4) of Rule 2(J) as implemented by the Conference is a predatory practice or group boycott aimed at taking cargo from NVOCCs in violation of sections 10(c)(1) and 10(c)(3) of the 1984 Act and we concur in the Presiding Officer's finding in this regard.

It follows that the Conference has not violated its organic agreement which prohibits the Conference from engaging in conduct prohibited by sections 10(c)(1) and 10(c)(3).[21] Likewise, there can be no violation of section 10(a)(3) which provides that "no person may operate under a section 5 agreement, except in accordance with the terms of the agreement or any modifications made by the Commission to the agreement".

D. Tariff Compliance.

Although Rule 2(J)(4) provides that transloading may "not take place at any ocean carrier facility or at any shipper's, consignee's, forwarder's (ICC Part IV licensed forwarders), or NVOCC's place of business" the Presiding Officer noted that the Rule does not mention an affiliate's place of business. As a result, the Presiding Officer found that the Conference's refusal to pay DSL a transloading allowance on the grounds that DSL's subsidiary DSLT performed the transloading was not in accordance with its

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21 See section 5(b)(5) of the 1984 Act, 46 USC app. § 1704(b)(5), which requires this provision in all conference agreements.

tariff and thus violated sections 10(b)(1) and 10(b)(3).[22]

The Conference argues that it should have been apparent to those using the tariff that affiliates could not be used to circumvent the intent of the Rule. The mere fact that the Conference may be required to determine under what conditions an affiliate may be subject to the Rule allegedly does not, in and of itself, render the Rule ambiguous. The Conference submits that Rule 60 of the tariff leaves no doubt as to the intent of Rule 2(J)(4). Rule 60 of the TPFCJ tariff reads, in pertinent part:

> Each of the parties . . . has a policy against the payment of any rebate, <u>directly or indirectly</u> . . . which payment would be unlawful.

The Conference argues that the Presiding Officer erred in concluding that Rule 60 and the regulatory scheme aimed at the prevention of rebating were not valid considerations here because no rebating was involved.

DSL believes that using DSLT to perform transloading was not contrary to Subpart (4). Accordingly, it argues that NOL improperly denied payment of the allowances.

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22 Section 10(b) provides, in relevant part:
(b) COMMON CARRIERS.--No common carrier, either along or in conjunction with any other person, directly or indirectly, may -

(1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts;

* * *

(3) extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its tariffs or service contracts;

TPFCJ's argument that DSL may not do indirectly what it is prohibited from doing directly is no doubt correct if the activity is contrary to the 1984 Act. For example, if a parent company is prohibited from receiving a rebate, it would be precluded from using a subsidiary to obtain a rebate. But using an affiliate subsidiary to perform transloading does not necessarily result in a rebate. In any event, having found that Subpart (4) is violative of section 10(d)(1) of the 1984 Act and cannot lawfully be applied to even those entities expressly named in the Subpart, there is no need to decide whether TPFCJ's application of Subpart (4) to affiliates of those named also violates section 10(b)(1) and 10(b)(3) of the 1984 Act, as alleged by DSL. We would point out, however, that because Rule 2(J), on its face, makes no reference to affiliates, it would appear not to include such entities within its scope.

E. Tariff Ambiguities.

The Presiding Officer held that Rule 2(J) is ambiguous and vague and insofar as the terms "direct interchange," "transloading," "consignee," and "place of business" are concerned, must be construed against its maker.

On Exceptions, the Conference states that the Presiding Officer apparently concluded that the terms of Rule 2(J) were ambiguous because there are disagreements between the parties over the meaning of the terms. TPFCJ argues that this view is not in accord with the law, citing Thomas G. Crowe, et al. v. Southern S.S. et al., 1 U.S.S.B. 145

(1929). "Transloading" and "direct interchange" are said to be terms of art which the record demonstrates are well understood and commercially acceptable. DSL disagrees and takes the position that the terms have no fixed meaning and are subject to ad hoc interpretation by the Conference.

The term "transloading," although relatively new, seems to have a meaning which is understood commercially. The record discloses that all parties generally agree on the definition of "transloading". The issue in controversy is not the definition of "transloading" but whether cargo subject to the Rule must be turned over to the inland carrier without performing any intervening services such as sorting, labeling or consolidating. The answer lies not in the definition of "transloading" but in the meaning of Subpart (1) which requires that the cargo moves in "direct interchange" to an inland carrier.

DSL argues that "direct" means something less than direct. However, the commonly accepted meaning of direct is "proceeding from one point to another in time or space without deviation or interruption." Webster's New Collegiate Dictionary, 323 (9th ed. 1977). DSL cannot avail itself of a strained or unnatural construction of the term. Dow Chemical Industries, Inc. v. American President Lines, Ltd., 19 F.M.C. 531, 539 (1977). Giving the term "direct" its generally accepted meaning, we read Subpart (1) of Rule 2(J) as precluding DSL from performing services such as sorting, labeling or consolidating prior to turning the cargo over to the inland carrier. If something less than the "direct interchange" is meant, it must be stated.

The meaning of "consignee" was first questioned when the Presiding Officer asked the Conference Chairman whether the Conference would pay an allowance if the ultimate consignee transloaded the cargo on behalf of the consignee listed on the bill of lading. The Conference Chairman replied that the term "consignee" as used in Subpart (4) of the Rule would cover the ultimate consignee. Tr. 5 at 118. TPFCJ and DSL make only passing references to the issue in their Exceptions and Replies and fail to explain how it relates to ultimate issues in this case. Accordingly, the Commission will not further address the issue.

The Presiding Officer states that "Rule 2(J)(4) does not define the term 'place of business' even though the meaning intended is different than its normal meaning." I.D. at 32. Apparently, the Presiding Officer would confine the definition of "place of business" to the place of incorporation or the location of the company's offices. Yet "place of business" is defined in Black's Law Dictionary, 1034 (5th Ed., 1979) to mean "the location at which one carries on his business or employment." This definition is certainly broad enough to encompass the facilities used for transloading cargo and we see no reason not to apply it here.

Finally, there is the dispute over the term "OCP" as used in Rule 2(J). Subpart (1) of Rule 2(J) requires delivery to "an OCP." DSL claims that because "OCP" is defined elsewhere in the tariff as "Overland Common Points" (emphasis added), cargo may be delivered to more than a single point within the OCP territory. However, we view the use of the singular article "an" before "OCP" in Subpart (1) as indicating that "OCP" is being used in the singular and therefore, reject DSL's interpretation.

In summary, we do not believe the record supports the Presiding Officer's holding that the above terms render Rule 2(J) ambiguous and vague.

F. Restriction on Intermodalism.

In its complaint, DSL alleges that Rule 2(J)(4) "restricts the use of intermodal services" within the meaning of section 10(c)(2) of the 1984 Act.[23] However, the Presiding Officer found that there is no basis in the record to make such a finding. DSL did not except to this finding. Accordingly, the Commission finds, as the Presiding Officer did, that no violation of section 10(c)(2) has been proven.

G. Reparations.

The Presiding Officer held that the Conference should be required to pay reparations on those shipments where it could be shown that "DSL as consignee has had cargo

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[23] Section 10(c)(2) provides:

> Concerted Act. - No conference or group of two or more common carriers may--
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> * * *
>
> (2) engage in conduct that unreasonably restricts the use of intermodal services or technological innovations.

transloaded for delivery to an OCP and where the cost of that transloading can be adduced from the record either by reference to an invoice or other evidence." I.D. at 39. He explains, however, that the evidence submitted by DSL did not permit him to compute the amount of the reparations. Accordingly, he suggests that if the Commission affirmed the remainder of the I.D., it should remand the case for further hearings on the amount of reparations.

TPFCJ opposes this suggestion on the grounds that DSL has been given sixteen months in which to produce the needed evidence and has failed to do so. DSL also opposes a remand, arguing that the Commission should simply order the Conference to pay the maximum allowance for each of the 99 shipments.

Section 11(g) of the 1984 Act, 46 U.S.C. app. § 1710(g), which governs reparations, states, in pertinent part:

> For any complaint filed within 3 years after the cause of action accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation of this Act plus reasonable attorney's fees.

We have found, for reasons stated above, that Subpart (4) of Rule 2(J) and its application to DSL, violates section 10(d)(1). However, for DSL to show "actual injury" in order to support a claim for reparations as a result of this violation, it must demonstrate that it would have qualified for transloading allowances under Rule 2(J) _but for_ the restrictions in Subpart (4).

It is undisputed that DSL did not comply with Subpart (9)(g) of Rule 2(J) which requires that the consignee claiming an allowance support the claim with an invoice for the cost of transloading. However, the Presiding Officer found that DSL's failure to comply with the requirement of Subpart (9)(g) of the Rule 2(J) would not bar reparations because that requirement was otherwise unreasonable. He acknowledged that:

> [I]t is true that where a conference or carrier does provide for absorptions and allowances, it has the right, if not the obligation, to base the allowance on cost data that is pertinent to it.

I.D. at 36. Nevertheless, the Presiding Officer found that the invoice requirement imposed by Rule 2(J)(9)(g) was an unreasonable practice in this case because NOL originally denied the allowance on the basis of Subpart (4) of the Rule and because DSL should have an opportunity to present its cost data in this proceeding, whether or not in the form of an invoice. The fact that Subpart (9)(g) was not part of the original rule and the Conference Chairman's testimony that he did not know how often members checked the invoices apparently played some part in the Presiding Officer's decision.

TPFCJ argues that the Presiding Officer erred in concluding that the invoice requirement of Subpart (9)(g) could not be used to bar payment of the transloading allowance to DSL. The Conference points out that Subpart (9)(g) was in effect during the period of the 99 shipments. As a tariff rule the Conference argues that it was binding on the parties and could not have been waived by NOL.

Both the carrier and shipper must abide by the carrier's duly filed tariff, unless it is found by the Commission to be unjustly discriminatory, unreasonable or otherwise illegal. Louisville & Nashville Railroad Company v. Maxwell, 237 U.S. 94, 97 (1915); United States v. Seatrain Lines, Inc., 370 F. Supp. 483, 484 (S.D.N.Y. 1973). Courts have consistently held that in an action predicated on a failure to comply with a published tariff the balance of equities between the parties is not even to be considered; the only question is whether there has been compliance with the filed tariff. United States v. Associated Air Transport, Inc., 275 F.2d 827, 832-834 (5th Cir. 1960).

That NOL failed to deny the claim on the basis of Subpart (9)(g) or that Subpart (9)(g) was added some time after the original transloading allowance rule was published are such equitable considerations. They form no basis upon which to relieve DSL from compliance with Subpart (9)(g). Therefore, contrary to the Presiding Officer, we cannot find, based on the record in this case, that the requirement that the consignee furnish an invoice for the cost of transloading is unreasonable.

As discussed infra, DSL's evidence supporting the claims for transloading allowances for the 99 shipments is incomplete and often conflicting. As a consequence, DSL's cost of transloading simply cannot be accurately determined. This is true despite the fact that during the course of the hearing in this proceeding, much time and effort was spent trying to verify how the 99 shipments actually moved. Obviously, the Conference cannot go through a similar exercise every time a consignee files a claim for a transloading allowance. Subpart (9) of the Rule appears to be a legitimate attempt to obtain the documents necessary to confirm that a given shipment was transloaded in the manner required by the Rule. The requirement that the consignee submit an invoice provides the Conference with a means to verify the consignee's cost of transloading. So long as the Conference chooses to publish a transloading allowance rule which is cost-based it is not unreasonable for it to establish a procedure to verify the shipper's cost of transloading.

Even if the Commission were to put aside the documentation requirements of Subpart (9), the evidence adduced during the hearing fails to establish that DSL is entitled to transloading allowances for the 99 shipments. To the extent the shipments moved under DSL's port-to-port tariff, the consignee (DSL's customer), not DSL, must pay the cost of any transloading.[24] Moreover, to the extent the shipments moved under a time volume contract, the rate paid by DSL's consignee covers DSL's cost of transloading.[25]

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[24] Rule 2K of DSL Tariff FMC No. 7.

[25] Allen R. Julian, DSL's Vice President testified that the rate in a port-to-port time volume contract would be fixed at a level to cover both ocean transportation and transloading expense. Tr. 3 at 136, 138.

Bills of lading supporting transloading claims filed by DSL in connection with shipments to Wal-Mart Stores, Inc. ("Wal-Mart"), a large consignee, indicate that the shipments moved under DSL's port-to-port tariff or under a port-to-port time volume contract. Allen R. Julian, DSL's Vice President, testified that the inland destination was inadvertently omitted from the bills of lading but that the shipments moved under DSL's intermodal tariff. Tr. 3 at 19. However, we do not find this explanation convincing since the rates shown on the bills of lading are either from DSL's port-to-port tariff or from a port-to-port time volume contract.

Rule 2(J) is intended to partially reimburse the consignee for the expense of transloading. We do not believe that DSL should be permitted to claim a transloading allowance for shipments where it incurred no transloading expense or where it was reimbursed by Wal-Mart. E.g. Absorption of Equalization on Explosives, 6 F.M.B. 138 (1960).

The transloading claims filed by DSL also include shipments for Edison Brothers Stores ("Edison") and Target Stores, Inc. ("Target") which were transloaded by Edison and Target rather than "arranged by and for the account of" DSL as required by Rule 2(J). Mr. Julian testified that DSL paid Edison $100 per shipment and Target $125.[26] Tr. 2-132. He also testified that DSL did not know the actual cost of

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26 These were later changed after the hearing to $126 for Target and $200 for Edison.

transloading. Tr. 2-131. This is not a sufficient basis upon which to make a claim for a transloading allowance.

The remaining claims are not supported by the documentation required by Rule 2(J). Thus, it is impossible to determine whether the shipments actually complied with the substantive conditions imposed by Rule 2(J).

The Presiding Officer has suggested that the case be remanded for the taking of further evidence on the claims. However, circumstances and past events indicate that further hearings would not be fruitful. First, given the volume of traffic handled by DSL, it is not likely that witnesses could remember the details pertaining to each of the 99 shipments in question. In any event, a claim for reparations must necessarily rest on documentary evidence and the most reliable and probative evidence of the circumstances surrounding the subject shipments are the shipping documents which were prepared in the normal course of business. Documents not prepared in the normal course of business but in anticipation of litigation are no substitute. It appears that all of the documents relating to the shipments that were prepared in the normal course of business have already been made a part of the record and that a further hearing would be unlikely to uncover any others. The Commission will not order further hearings when they can serve no purpose. See RKO General Inc. v. F.C.C., 670 F.2d 215 (D.C. Cir. 1981), cert. denied 457 U.S. 1119, 469 U.S. 1017.

H. Status of Hapag-Lloyd A.G. and Lykes Bros. Steamship Co. Inc.

During the period when the 99 shipments moved, Hapag and Lykes were members of the Conference. However, Hapag terminated its membership in December, 1985 and Lykes left the Conference in June, 1986. Neither carrier is alleged to have denied DSL a transloading allowance during the period when they were members of the Conference.

Hapag and Lykes except to that portion of the I.D. which reserves the potential imposition of a reparations award against them. They argue that liability for damages caused by NOL's refusal to pay DSL transloading allowances runs to that line and not to the Conference, and that even if the Conference were found liable, the liability does not run to each and every Conference member.

Insofar as any prospective relief is concerned, Hapag and Lykes point out that they are no longer in the trade and thus it would serve no purpose to include them in any order granting prospective relief. The Presiding Officer's reliance on Cargill, Inc. v. Waterman Steamship Corp., 21 S.R.R. 287 (1981), as authority for denying their motions to dismiss is said to be misplaced. The case allegedly did not hold that the conference and its members could be held liable for damages arising from the conduct of a member. Rather, Hapag and Lykes submit that the case merely held that the conference was a necessary party if the remedy affected the conference tariff.

Hapag and Lykes also attack the Presiding Officer's reliance on a provision in the Conference agreement imposing liability for:

> . . . the payment of conference expenses incurred or contracted prior to or during the term of their membership.

They argue that this is an intraconference matter and of no concern to the Commission. Moreover, the provision is said to relate to expenses, not Shipping Act liabilities. For the foregoing reasons, Hapag and Lykes request that they be relieved from any liability in this case.

Although Hapag and Lykes did not carry any of the 99 shipments, the same may be said of other Conference members. Nevertheless, Hapag and Lykes are responsible for the consequences of Conference decisions made during the period of their membership. American Export-Isbrandtsen Line v. Federal Maritime Commission, 409 F.2d 1258, 1260 (2nd Cir. 1969). They have the same liability as any other Conference member that did not actually handle any of DSL's shipments.[27] Under the circumstances Hapag and Lykes are proper parties to this proceeding.

THEREFORE, IT IS ORDERED, That the Exceptions of Trans-Pacific Freight Conference are granted to the extent indicated above and denied in all other respects;

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27 To hold otherwise would be to allow Conference members to escape potential liability once legal action is brought by a third party or the Commission by the simple expedient of resignation.

IT IS FURTHER ORDERED, That the Exceptions of Distribution Services, Ltd. are denied;

IT IS FURTHER ORDERED, That the Exceptions of Hapag-Lloyd A.G. and Lykes Bros. Steamship Co., Inc. are denied;

IT IS FURTHER ORDERED, That the Trans-Pacific Freight Conference remove Subpart 4 from Rule 2(J) of TPFCJ Tariff No. 36, FMC-7 and so advise the Secretary of the Commission within 30 days of the date of the service of this Report and Order; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

Joseph C. Polking

Joseph C. Polking
Secretary

Separate Opinion of Commissioner Ivancie

I disagree with the Commission's conclusion that Subpart (4) of TPFCJ's transloading allowance is an unreasonable practice violative of Section 10(d)(1) of the Shipping Act of 1984. The record in this case provides ample evidence to conclude that the problem of verifying transloading expenses is a serious one. DSL itself has been unable to provide the Commission with adequate information upon which to compute reparations. TPFCJ is clearly justified in requiring that third parties perform the transloading function because this practice assures an industry-tested and reliable means of obtaining an accurate reflection of the transloading costs. The Commission's opinion seems to unreasonably require TPFCJ to adopt other methods which may not provide TPFCJ with an objective basis upon which it may calculate transloading costs. The Commission's opinion may have the unintended effect of forcing TPFCJ to abandon its practice of basing its transloading allowance on cost.

I concur with all other aspects of the Commission's opinion.

Commissioner Moakley, dissenting in part

I believe that the majority's order properly disposes of the issues in this case with one exception. I would not find the conference's practice of requiring third parties to transload cargo to be unreasonable under section 10(d)(1) of the Act. This finding runs counter to precedent* and to the parallel, Congressionally-sanctioned practice of awarding compensation solely to third party freight forwarders and not to shippers who perform their own forwarding services. The goal is the same in both practices - the prevention of illegal rebates to shippers. Moreover, the burden of establishing the unreasonableness of this practice is on complainant in this proceeding. It has not done so.

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* General Investigation of Pickup and Delivery Rates and Practices in Puerto Rico, 16 F.M.C. 344 (1973) and Stockton Port District v. Pacific Westbound Conference, 9 F.M.C. 12 (1965).